No. 14-1406

In The
Supreme Court of the United States

STATE OF NEBRASKA
AND
VILLAGE OF PENDER, NEBRASKA,

Petitioners,

v.

MITCH PARKER
AND
UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case warrants the Court's review, as the Eighth Circuit's decision effectively removed the third factor in *Solem v. Bartlett*, 465 U.S. 463 (1984), from the diminishment analysis and alters the status quo by expanding the jurisdiction of the Omaha Tribe more than 130 years after diminishment.

The State of Nebraska consistently and exclusively exercised jurisdiction over Pender without contest or objection from the Omaha Tribe or the United States from 1882 until 2006. Immediately following the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341, the major portion of the disputed area was quickly absorbed by settlers. Since the early twentieth century, non-Indians have comprised more than 98% of the area's population and more than 98% of the land in the area was conveyed from the United States to non-Indians. Neither Pender nor its citizens have ever been subjected to the jurisdiction of the Omaha Tribe. These facts are undisputed and lead to one conclusion – that the Omaha Reservation was diminished long ago. The citizens of Pender have developed justifiable expectations accordingly.

I. Petitioners Preserved Review Of Their Diminishment Claim.

Respondents try to avoid the lower courts' disregard of the third *Solem* factor and *de facto* diminishment by selectively identifying instances where the Petitioners argued to the Eighth Circuit that the

third factor should be resolved in their favor but did not explicitly state that the courts' analysis "precluded proper consideration" of the third factor. Br. in Opp. 9. But Respondents ignore (1) this issue was repeatedly raised, and (2) the lower courts expressly declined application of the third factor even after finding unclear statutory language and legislative history.

1. Contrary to Respondents' assertion, the issue on appeal was "Whether Congress diminished the boundaries of the Omaha Indian Reservation in Nebraska by the Acts of June 10, 1872, and August 7, 1882." State of Neb. C.A. Br. 5; Brehmer et al. C.A. Br. 11. That question is presented by this petition. As part of that broader question below, and presented more specifically to this Court, Petitioners questioned the exclusion of the third factor in the analysis. See State of Neb. C.A. Reply Br. 4, 6-7; Brehmer et al. C.A. Reply Br. 10-17. Moreover, Petitioners identified how the case would likely be decided differently in both the Seventh and Tenth Circuits, which have both found reservations diminished/disestablished when applying all three factors of the *Solem* test. See Brehmer et al. C.A. Reply Br. 14-17. In these two cases, the courts found diminishment/disestablishment despite the absence of explicit termination language in either of the Acts at issue. *Wisconsin v. Stockridge-Munsee Cmty.*, 554 F.3d 657, 662-65 (7th Cir. 2009) and *Osage Nation v. Irby*, 597 F.3d 1117, 1123-28 (10th Cir. 2010). The lower courts should have reached the same conclusion in this case.

2. In error, the district court found that it was bound to rule that diminishment did not occur (App. 68), regardless of evidence on the third factor establishing diminishment. (App. 76). Respondents try to gloss over this error – like the court of appeals did – by characterizing the district court's cursory inclusion of "subsequent treatment" discussion as confirmation "the district court examined all three factors at great length." Br. in Opp. 10. However, simply describing the district court's analysis as thorough, and at great length, does not mean either court considered the third factor after finding unclear statutory language and legislative history. The district court confirmed it precluded consideration of the third factor when it stated that it would only address the third factor to comply with the analytical structure. (App. 68-69). Then, instead of recognizing the district court's rationale for what it was, a two-factor test, the Eighth Circuit deemed additional analysis "unnecessary surplus." (App. 7).

II. Nebraska's Longstanding Assumption Of Exclusive Jurisdiction Over The Area That Is, And Always Has Been, Over Ninety-Eight Percent Non-Indian Confirms Diminishment of the Reservation.

Nebraska's longstanding assumption of exclusive jurisdiction over the area that is, and always has

been, over ninety-eight percent non-Indian confirms diminishment of the reservation.

There is no dispute that:

- Immediately following the 1882 Act, the major portion of the disputed area was quickly absorbed by settlers;
- Since the early twentieth century, non-Indians have comprised more than 98% of the area's population;
- More than 98% of the land in the area was conveyed from the United States to non-Indians;
- Neither Pender nor its citizens have ever been subjected to the jurisdiction of the Omaha Tribe; and
- The Omaha Tribe asserted jurisdiction over Pender for the first time in 2006 when it wished to tax the sale of alcoholic beverages.

Moreover, the State of Nebraska has consistently exercised jurisdiction over Pender without contest or objection from the Omaha Tribe or the United States from 1882 until 2006. The Omaha Reservation was diminished long ago. See *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215-16 (2005) (in a different, but related context, reiterating that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may

create justifiable expectations"), quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977); *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

1. The undisputed demographics of the area reveal diminishment. Since 1900, there have never been more than 72 Indians (1.8% of the total population) living on this land, and as of the year 2000, only 21 Indians (0.83% of the total population) lived there. These facts stand in stark contrast to the demographics of the land east of the right of way, where 2,337 Indians (69.78% population) lived as of 2000. Viewed another way, as of 2000, less than 1% of the total population of Indians living in the counties with territory affected by the 1882 Act (Thurston and Cuming) live on the west side of the right of way.

By the end of 1883, only 10 to 15 Indian allotments totaling 876 of the approximately 50,000 acres, less than 2% of the total acreage, in the area had been allotted to Omaha Tribe members. (App. 34). The remaining 98% of the land was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913. (App. 36). And by 1919, "all lands allotted to Omaha Tribe members west of the Railroad right-of-way had been patented in fee simple; thus, no trust land remained west of the demarcation line." *Id.*

These statistics are even more compelling than those described in the four cases where this Court found diminishment. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-57 (1998) (two-thirds

of the population was non-Indian and more than 90% of the reservation lands were in non-Indian lands); *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977) (involved land that was "over 90% non-Indian both in population and in land use"); *Decoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975) (approximately 90% of the population was non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). This near-total absence of Indian character combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421; see also *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

2. The State of Nebraska immediately assumed, and has consistently asserted jurisdiction over the area. Before 2006, the Omaha tribe and the United States apparently deemed the State of Nebraska's assumption of jurisdiction over the area, and the citizens of Pender's reliance on this assumption of jurisdiction, as consistent with the 1882 Act. There is no evidence in the record that before 2006 the Omaha Tribe attempted to enforce tribal ordinances in the area. (App. 47). Nor does the Tribe offer foster care, medical, welfare, or child protective services in the

area. *Id.* The Tribe does not have an office, operate a school, industry, or business in the area or conduct any governmental or ceremonial activities there. (App. 47-48). The Tribe has no mineral rights or other claims to land in the area. (App. 48). This dispute arose when the Tribe wished to tax the sale of alcoholic beverages in Pender for the first time in 2006.

Given these facts, and the resulting justifiable expectations of the citizens of Pender, this Court should confirm that even under the *Solem* factors, the longstanding assumption of jurisdiction by the State over an area that is over 98% non-Indian, both in population and in land use, is entitled to considerable weight. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. at 215-16.

Finally, the court of appeals and district court did not, as Respondents allege, "[find] that the first factor . . . strongly suggests that Congress did not intend to diminish the Reservation." Br. in Opp. 12. On the contrary, the lower courts found the first factor unclear. (App. 6, 76). Moreover, Petitioners would suggest that if the statutory language was as clear as Respondents now claim, why did Respondents not assert jurisdiction between 1882 and 2006? If the language was so easily interpreted that way, why wasn't it? Instead in 1989, five years after *Solem*, the Department of the Interior confirmed the reservation was diminished and only in 2008, after this case started, did the Department state otherwise. (App. 42-44).

For over 130 years, the individuals who have chosen to reside in the Pender, Nebraska area and build homes, schools, and churches, open businesses and raise families, have developed justifiable expectations that the area in which they are doing these things was under the jurisdiction of the State of Nebraska. The Eighth Circuit's decision needlessly alters the status quo by precluding meaningful consideration of the third *Solem* factor. This exceptionally important issue warrants the Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 1st day of September, 2015.

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